Legislative Update

The Chelko Consulting Group

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Introduction

While we may be focused on completing our Annual Enrollment processing and finding that “just right” Christmas gift, we should not think that the legal environment is so sympathetic to our priorities that it is taking some time off. We therefore want to highlight two items of significance that should not fall off your radar screen.

First is the “stealth item” in the Supreme Court’s review of the constitutionality of PPACA. This item is called the Anti-Injunction Act. How the Court rules on the applicability of this 1867 law may have more to do with what you do about PPACA over the next three years than you now expect.

The second item is a series of recently issued questions and answers (FAQs) that formalize the deferral of the Summaries of Benefits and Coverage and, perhaps even more importantly, deal with thorny questions regarding how plans must comply with some complex mental health parity requirements.

Following are some comments on each of these important developments.

The Anti-Injunction Act

Most of the public interest in the Supreme Court’s recent announcement to decide on the constitutionality of several parts of PPACA has been focused on the law’s “individual mandate” to purchase health care coverage. Much less light has been focused on something else the Supreme Court announced it would decide upon in its PPACA deliberations. The Court also agreed to decide if -- as one federal appeals court ruled -- the litigation surrounding *the individual mandate must be deferred until 2015* because of the 1867 Anti-Injunction Act. This law bars courts from striking down tax laws before they take effect. Since not purchasing health care coverage brings a penalty, that penalty can be considered a tax. The Court will consider whether this “tax” can be barred before anyone actually pays it, which won’t be until 2015. The 1867 Anti-Injunction Act can be interpreted as preventing the Supreme Court from considering the constitutionality of PPACA’s individual mandate until 2015. The theory would be that until then, “no harm, no foul”.

If the Supreme Court’s justices agree that the Anti-Injunction Act applies, and a decision on the individual mandate gets put off until at least 2015, the PPACA case now before the Court might turn out to be an anticlimax leaving benefits managers without guidance for sound strategy over the next several years. The Court’s assignment of a full hour of oral argument to this question suggests that some of the justices take this issue very seriously.

There are various ways the Court can rule on PPACA in addition to the Anti-Injunction Act. It is possible that some parts of PPACA will be allowed to go forward and others not. What we are ultimately left with may be the result of complicated Court decision. What happens if certain parts of PPACA survive the Court’s review (including the effect of a ruling on the Anti-Injunction Act) and other parts don’t? The possible outcomes are graphically displayed in a recent Kaiser article: Legal Questions And Answers That Will Decide The Health Law’s Fate.

The FAQs

These are important because they push back the effective date of the Summaries of Benefits and Coverage and because they address the application of comparative non quantitative limits between medical surgical events and mental health/substance use events.

http://www.graphicmail.com/new/viewnewsletter2.aspx?SiteID=18232&SID=0&NewsletterID=743733[12/1/2011 12:28:48 PM]

Summaries of Benefits and Coverage

The March 23, 2012 effective date for completion of the Summaries of Benefits and Coverage has been withdrawn and replaced by an unknown date based on whenever final regulations are issued (in response to comments on the August 22 version of the Summaries). The DOL, Treasury and HHS promise that plan sponsors will be given ample time, after the release of those regulations, to prepare the Summaries. Note: the expectation is that TPAs will prepare these Summaries.

Mental Health Parity

In a series of Q & A's, the Departments try to clarify how parity is to be achieved regarding "non quantitative limitations". These limitations include plan management techniques like prior authorization. There is a deceptively simple-sounding principle that comes out of these Q & A's. It is that the plan should not have any distinction in the criteria or application that these techniques use with medical/surgical events compared to how the plan applies them to mental health/substance use events. Again, simple-sounding but subtleties abound. For example, if the plan applies prior authorization to medical/surgical events that requires a formal treatment plan after 7 days of inpatient care and applies the same prior authorization technique to mental health/substance use events that requires a formal treatment plan after 1 day of inpatient care, you've probably got a violation of parity as a result.

Question and Answer 4 may produce a lot of commentary as time goes on. This Q & A addresses sophisticated plan management. This includes the application of techniques like comparative clinical efficacy measurements, scrutiny of the variability in treatment cost and quality and even examination of elasticity of demand. The good news is that the Departments do not see the application of these techniques as violative of parity as long as they are not applied "more stringently" to mental health/substance use events than they are to medical/surgical events. The FAQs can be found here: http://www.dol.gov/ebsa/faqs/faq-aca7.html

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